



For a thriving New England

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September 7, 2016

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George M. Bald, Chairman
Peter J. Loughlin, Vice Chairman
Robert A. Allard, Board Member
Margaret F. Lamson, Board Member
John Bohenko, Board Member
Franklin Torr, Board Member
Robert Preston, Board Member
Pease Development Authority
55 International Drive
Portsmouth, NH 03801

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SEP - 8 2016

OFFICE OF THE REGIONAL ADMINISTRATOR

Pease Development Authority
State House
Concord, NH 03301

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED, TO THE ATTENTION OF
DAVID R. MULLEN, EXECUTIVE DIRECTOR, PEASE DEVELOPMENT
AUTHORITY**

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation ("CLF")¹ hereby gives notice to the addressed persons² of its intent to file suit, pursuant to Section 505 of the Federal Water Pollution Control Act ("Clean

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Great Bay watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live in or near the Great Bay watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the stormwater discharges from Pease International to receiving waters without a permit and in violation of the Clean Water Act.

² Pursuant to 40 C.F.R. § 135.2(a)(1), notice of intent to file suit may be served upon a corporation's registered agent. Pease Development Authority has not identified a "registered agent" in connection with its corporation filings with the New Hampshire Secretary of State. See New Hampshire Secretary of State, Corporation Division, *Filed Documents for Pease Development Authority*, <https://www.sos.nh.gov/corporate/soskb/Corp.asp?391471> (last visited August 22, 2016). Under 40 C.F.R. § 135.2(a)(2), however, service may also be effected upon the head of a state or local agency. Under New Hampshire law, Pease Development Authority is considered a "body politic and corporate of the state" and "deemed to be a public instrumentality, and the exercise by the authority of the powers



Water Act” or “Act”), 33 U.S.C. § 1365, for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R. Part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in the United States District Court for the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter. CLF intends to name the Pease Development Authority and the following individuals associated therewith as defendants: David R. Mullen in his official capacity as Executive Director, George M. Bald in his official capacity as Chairman, Peter J. Loughlin in his official capacity as Vice Chairman, Robert A. Allard in his official capacity as Board Member, Margaret F. Lamson in her official capacity as Board Member, John Bohenko in his official capacity as Board Member, Franklin Torr in his official capacity as Board Member, and Robert Preston in his official capacity as Board Member.

The subject of this action is threefold. First, Pease Development Authority is discharging stormwater from systems of conveyances, including roadways, storm drains, storm sewers, drainage ditches, and outfalls located throughout the Pease International Tradeport and Airport (“Pease International”), to the waters of the United States without a permit, in violation of Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342. Further, Pease Development Authority has failed to obtain coverage under the required Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit, and has failed to comply with the specific requirements of any such permit, in violation of Section 402 of the Clean Water Act, 33 U.S.C. §§ 1342, and 40 C.F.R. §§ 122.32–122.36.³

PERSON RESPONSIBLE FOR ALLEGED VIOLATIONS

Pease Development Authority and its agents with operational control over Pease International are the persons, as defined by Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Pease Development Authority has owned and operated Pease International since at least 1997.⁴ Accordingly, Pease Development Authority is responsible for managing stormwater at Pease International in compliance with the Clean Water Act.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Pease International is a regulated small municipal separate storm sewer system (“MS4”), pursuant to 40 CFR §§ 122.26(b)(8) and 122.26(b)(16). Specifically, it constitutes a system of conveyances

conferred by this chapter shall be deemed and held to be the performance of public and essential governmental functions of the state.” NH Rev Stat § 12-G:3 (2015). Pease Development Authority identifies the addressed persons as its executive management.

³ The U.S. Environmental Protection Agency promulgated 40 C.F.R. §§ 122.30–122.37, requiring small municipal separate storm sewer systems to obtain NPDES permit coverage for their stormwater discharges, pursuant to the statutory mandate set forth in Section 402(p)(6) of the Clean Water Act, 33 U.S.C. §§ 1342(p)(6).

⁴ See *About Us: History*, PEASE INTERNATIONAL, <http://www.peasedev.org/about-history.html> (last visited August 31, 2016).



(including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains), which are: (1) designed or used for collecting or conveying stormwater that is not a combined sewer or publicly owned treatment works, and (2) owned or operated by a public body created pursuant to state law and having jurisdictional authority over stormwater. In accordance with 40 CFR § 122.32, Pease International is located in an urbanized area as determined by the latest Decennial Census by the Bureau of Census.

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.⁵ Stormwater runoff picks up pollutants, including chemicals, toxins, pathogens, nutrients, heavy metals, oils, and sediment that harm waterways.⁶ Stormwater runoff transported through MS4s and discharged into water bodies elevates pollutant concentrations and loadings in these waters and changes their natural hydrologic patterns.⁷

Pease Development Authority transports stormwater runoff and discharges it into the waters of the United States described below.

Pease International discharges directly or indirectly into Newfields Ditch⁸ (Waterbody ID NHRIV600031001-10), Upper Hodgson Brook⁹ (Waterbody ID NHRIV600031001-05), Lower Hodgson Brook¹⁰ (Waterbody ID NHRIV600031001-04), North Mill Pond¹¹ (Waterbody ID NHEST600031001-10), the Lower Piscataqua River–South¹² (Waterbody ID NHEST600031001-02-02), Pickering Brook and Flagstone Brook¹³ (Waterbody ID NHRIV600031001-01), Lower

⁵ See 40 C.F.R. § 122.26(b)(13).

⁶ See 40 C.F.R. § 122.30.

⁷ *Id.*

⁸ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR NEWFIELDS DITCH (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-10&p_list_id=NHRIV600031001-10&p_cycle=2012.

⁹ Alternatively known as “Hodgkins Brook”; see also U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR UPPER HODGSON BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-05&p_list_id=NHRIV600031001-05&p_cycle=2012.

¹⁰ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER HODGSON BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-04&p_list_id=NHRIV600031001-04&p_cycle=2012.

¹¹ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR NORTH MILL POND (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600031001-10&p_list_id=NHEST600031001-10&p_cycle=2012.

¹² See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER PISCATAQUA RIVER–SOUTH (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600031001-02-02&p_list_id=NHEST600031001-02-02&p_cycle=2012.

¹³ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR PICKERING BROOK AND FLAGSTONE BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-01&p_list_id=NHRIV600031001-01&p_cycle=2012.

Little Bay General Sullivan Bridge¹⁴ (Waterbody ID NHEST600030904-04-04), Lower Little Bay Marina SZ¹⁵ (Waterbody ID NHEST600030904-06-14), Lower Piscataqua River–North¹⁶ (Waterbody ID NHEST600031001-02-01), McIntyre Brook¹⁷ (Waterbody ID NHRIV600030904-11), Fabyan Point¹⁸ (Waterbody ID NHEST600030904-04-04), Great Bay¹⁹ (Waterbody ID NHEST600030904-04-05), Lower Grafton Brook²⁰ (Waterbody ID NHRIV600031001-06), “Unnamed Brook–to Unnamed Marsh”²¹ (Waterbody ID NHRIV600030904-07), Kennard Dam²² (Waterbody ID NHIMP600030904-0), “Unnamed Brook–through Unnamed Marsh to Great Bay”²³ (Waterbody ID NHRIV600030904-08), Pickering Brook²⁴ (Waterbody ID NHEST600030904-04-03), Peverly Brook²⁵ (Waterbody ID NHRIV600030904-12), Peverly

¹⁴ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER LITTLE BAY GENERAL SULLIVAN BRIDGE (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-06-15&p_list_id=NHEST600030904-06-15&p_cycle=2012.

¹⁵ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER LITTLE BAY MARINA (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-06-14&p_list_id=NHEST600030904-06-14&p_cycle=2012.

¹⁶ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER PISCATAQUA RIVE –NORTH (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600031001-02-01&p_list_id=NHEST600031001-02-01&p_cycle=2012.

¹⁷ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR MCINTYRE BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030904-11&p_list_id=NHRIV600030904-11&p_cycle=2012.

¹⁸ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR FABYAN POINT (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-04-04&p_list_id=NHEST600030904-04-04&p_cycle=2012.

¹⁹ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR GREAT BAY (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-04-05&p_list_id=NHEST600030904-04-05&p_cycle=2012.

²⁰ Alternatively known as “Grafton Ditch”, “Grafton Creek”, or “Harvey’s Creek”; see also U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER GRAFTON BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-06&p_list_id=NHRIV600031001-06&p_cycle=2012.

²¹ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR UNNAMED BROOK – TO UNNAMED MARSH (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030904-07&p_list_id=NHRIV600030904-07&p_cycle=2012.

²² See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR KENNARD DAM (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHIMP600030904-01&p_list_id=NHIMP600030904-01&p_cycle=2012.

²³ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR UNNAMED BROOK – THROUGH UNNAMED MARSH TO GREAT BAY (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030904-08&p_list_id=NHRIV600030904-08&p_cycle=2012.

²⁴ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR PICKERING BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-04-03&p_list_id=NHEST600030904-04-03&p_cycle=2012.

²⁵ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR PEVERLY BROOK (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600030904-12&p_list_id=NHRIV600030904-12&p_cycle=2012.



Brook Pond²⁶ (Waterbody ID NHLAK600030904-01), “Unnamed Brook–to Piscataqua River”²⁷ (Waterbody ID NHRIV600031001-02), South Mill Pond²⁸ (Waterbody ID NHEST600031001-09), and Lower Little Bay²⁹ (Waterbody ID NHEST600030904-06-18) (collectively, the “Receiving Waterbodies”), which are all waterbodies within the Piscataqua–Salmon Falls watershed. EPA has designated these waterbodies variously as habitats for “fish, shellfish, and wildlife protection and propagation”, “aquatic life harvesting”, “public water supply”, and recreation.

Pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), EPA has designated the Receiving Waterbodies as impaired for failure to meet minimum water quality standards. The Receiving Waterbodies are variously impaired for chloride, dioxins (including 2,3,7,8-TCDD), impaired biota (benthic macroinvertebrate bioassessments, habitat assessment for streams, and estuarine bioassessments), organic enrichment (dissolved oxygen saturation), pathogens (namely *Escherichia coli*, or *E. coli*, *Enterococcus* bacteria, and fecal coliforms), turbidity (light attenuation coefficient), nutrients (namely nitrogen), aluminum, arsenic, cadmium, chromium, copper, iron, lead, manganese, mercury, zinc, polychlorinated biphenyls (“PCBs”), Perfluorooctanesulfonate (“PFOS”), Perfluorooctanoate (“PFOA”), and pH, for which stormwater is a probable source of impairments.³⁰

Based on data that Pease Development Authority and others have collected, Pease Development Authority’s stormwater discharges include petroleum hydrocarbons, nitrogen, phosphorus, total suspended solids, arsenic, iron, nickel, zinc, lead, polycyclic aromatic hydrocarbons, surfactants, cyanide, propylene glycol, volatile organics (including acetone), bacteria (including *e.coli*, enterococci and fecal coliform), nitrate, ammonium, phosphate, pesticides and other pollutants. Pease Development Authority and others have identified outfalls that discharge stormwater with some combination of the above pollutants, including, but not limited to, outfalls identified as “001-A”, “002-A”, “003-A”, and “004-A”, which discharge into the Receiving Waterbodies, including Hodgson Brook (alternatively, “Hodgkins Brook”), Flagstone Creek, McIntyre Brook, Newfield Ditch, and Grafton Ditch (alternatively, “Grafton Brook”, “Grafton Creek”, or “Harvey’s Creek”).

²⁶ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR PEVERLY BROOK POND (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHLAK600030904-01&p_cycle=2012.

²⁷ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR UNNAMED BROOK – TO PISCATAQUA RIVER (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV600031001-02&p_cycle=2012.

²⁸ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR SOUTH MILL POND (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600031001-09&p_list_id=NHEST600031001-09&p_cycle=2012.

²⁹ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR LOWER LITTLE BAY (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHEST600030904-06-18&p_list_id=NHEST600030904-06-18&p_cycle=2012

³⁰ See *supra* notes 7–28.



The quality of water in Hodgson Brook (alternatively, “Hodgkins Brook”) and Grafton Ditch (alternatively, “Grafton Brook”, “Grafton Creek”, or “Harvey’s Creek”) in particular is notable and troubling as a result of these discharges. Monitoring programs with sampling locations at and around Pease International have shown Pease Development Authority’s stormwater discharges to be main contributors of pollutants to Hodgkins Brook (alternatively, “Hodgson Brook”) and other nearby waters of the United States. These discharges occur, at a minimum, every time there is a one inch or greater precipitation or snow and ice melt event. These discharges are non-exclusive examples of the violations occurring at Pease International, and represent a non-exclusive list of the pollutants discharged and the sites at which discharges occur.

Given that Pease Development Authority constitutes the owner and operator of a regulated small MS4, it is required to apply for, obtain, and comply with the requirements of an NPDES permit for small MS4s in order to discharge stormwater lawfully. Since Pease Development Authority has failed to take any of these required steps, it is operating in violation of the Clean Water Act.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to waters of the United States, except in accordance with a valid NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.⁶ Pease Development Authority discharges stormwater from systems of conveyances located throughout Pease International into waters of the United States. Because Pease Development Authority has not obtained coverage for these stormwater discharges under a NPDES permit for small MS4s, it is illegally discharging stormwater without a permit, in violation of Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342. Pursuant to Section 402(p)(6) of the Clean Water Act, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations at 40 C.F.R. § 122 setting forth NPDES permitting requirements for small MS4s.

In accordance with 40 C.F.R. § 122.34, NPDES permits for regulated small MS4s require permittees, at a minimum, to develop, implement, and enforce a stormwater management program, which must detail the stormwater control practices that will be implemented consistent with permit requirements to minimize the discharge of pollutants from the MS4s. By failing to apply for and comply with the specific requirements of an NPDES permit for small MS4s, Pease Development Authority is in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.32–122.36. Additional information, including information in Pease Development Authority’s possession, may reveal additional violations. CLF intends to sue for all violations, including those yet to be uncovered and those committed after the date of this notice letter. This notice letter covers all such violations to the full extent permitted by law.

⁶ 33 U.S.C. § 1311(a).



DATES OF VIOLATION

Each day on which Pease Development Authority operates Pease International without NPDES permit coverage for a small MS4 and without a stormwater management program for a small MS4 is a separate and distinct violation of Sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342.

Since at least 2011, Pease Development Authority has discharged stormwater from Pease International without a permit for a small MS4, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as well as failed to apply for, obtain, and comply with the requirements of an NPDES permit for a small MS4, in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, and 40 C.F.R. §§ 122.32–122.36. Pease Development Authority's discharges in violation of the Clean Water Act occurred, at a minimum, during every precipitation event—including snow and ice melt events—of one inch or more since at least 2011, and continue to this day.

These violations are ongoing and continuous, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Pease Development Authority is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Pease Development Authority to a penalty up to \$37,500 per day per violation for all violations occurring from January 12, 2009 through November 2, 2015, and \$51,570 for penalties that are assessed on or after August 1, 2016, for violations that occurred after November 2, 2015.³¹ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act, pursuant to Sections 505(a) and (d), 33 U.S.C. §§ 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the court requiring Pease Development Authority to correct all identified violations through direct implementation of the NPDES permitting requirements for small MS4s, including implementation of the requisite stormwater management program, and demonstration of full regulatory compliance.

³¹ See 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4; 19; <https://www.federalregister.gov/articles/2016/07/01/2016-15411/civil-monetary-penalty-inflation-adjustment-rule#h-22.53>.



Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,

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